

No. 17A\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN ECONOMY INSURANCE COMPANY, AMERICAN FIRE AND CASUALTY COMPANY, AMERICAN STATES INSURANCE COMPANY, EMPLOYERS INSURANCE COMPANY OF WAUSAU, EXCELSIOR INSURANCE COMPANY, FIRST LIBERTY INSURANCE CORP., GENERAL INSURANCE COMPANY OF AMERICA, LIBERTY INSURANCE CORPORATION, LIBERTY MUTUAL FIRE INSURANCE CO., LIBERTY MUTUAL INSURANCE COMPANY, LM INSURANCE CORPORATION, NETHERLANDS INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, OHIO SECURITY INSURANCE COMPANY, PEERLESS INDEMNITY INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, WAUSAU BUSINESS INSURANCE COMPANY, WAUSAU GENERAL INSURANCE COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY AND WEST AMERICAN INSURANCE COMPANY,

*Applicants,*

*v.*

THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, BENJAMIN M. LAWSKY, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES AND STATE OF NEW YORK WORKERS' COMPENSATION BOARD,

*Respondents.*

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**APPLICATION FOR EXTENSION OF TIME TO FILE A  
PETITION FOR A WRIT OF CERTIORARI TO THE  
NEW YORK COURT OF APPEALS**

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TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

1. Pursuant to Supreme Court Rule 13.5, American Economy Insurance Company et al. ("AEIC") respectfully request a 30-day extension of time, to and including February 21, 2018, to file a petition for a writ of certiorari in this case. Applicants have not previously requested an extension. The New York Court of Appeals issued its decision on October 24, 2017. *See App.* Absent an extension of time, AEIC's petition for a writ of certiorari would be due on January 22, 2018. This

application complies with Rules 13.5 and 30.2 because it is being filed ten days or more before the petition is due.

2. Beginning in 1933, the New York Workers' Compensation Law provided for a special fund to pay workers' compensation benefits to injured employees whose cases were closed and later reopened after an extended period of inactivity. New York law explicitly assigned exclusive responsibility for such cases to the fund, not employers.

3. Under State-approved workers' compensation policy contracts, insurers explicitly agreed to cover only the liabilities that the Workers' Compensation Law "in effect during the policy period" required employer-insureds to pay, and thus insurers did not agree to cover reopened cases within the fund's purview. Accordingly, employer-insureds paid state-approved premiums that reflected the fact that the insurers would not be responsible for such cases.

4. In 2013, the New York legislature amended the Workers' Compensation Law to close the fund to cases reopened on or after January 1, 2014. This amendment applied to all preexisting and future workers' compensation policies. The State subsequently approved premium increases to account for insurers' new liability for reopened cases that would have been covered by the fund absent the amendment—but only for future policies issued on or after October 1, 2013. As a result, according to the New York Compensation Insurance Rating Board, the amendment imposed on insurers (including AEIC) a new, "unfunded liability" under preexisting policies of \$1.1 to \$1.6 billion.

5. AEIC challenged the amendment in state court, arguing that its retroactive imposition of new liabilities under preexisting policy contracts violated the

Contracts, Takings, and Due Process Clauses of the U.S. Constitution, as well as analogous provisions of the New York constitution. A unanimous panel of the Appellate Division of the Supreme Court of the State of New York declared the amendment unconstitutional.

6. The New York Court of Appeals reversed. The Court of Appeals rejected the Contracts Clause claim on the ground that the amendment “does not impair th[e] contractual relationship” between insurers and their employer-insureds. App. at 17. It dispatched the Takings Clause claim because the insurers had not “identified any vested property interest impaired by the legislative amendment.” *Id.* at 26. And in denying the Due Process Clause claim, it determined that the amendment could rationally have been enacted as a cost-savings measure for “New York businesses.” *Id.* at 31. The court did not address *U.S. Fidelity & Guaranty Co. v. McKeithen*, in which the U.S. Court of Appeals for the Fifth Circuit held that a Louisiana statute was “retroactive” and violated the Takings Clause because it changed a state insurance fund assessment formula for carriers paying future benefits under preexisting workers’ compensation policies. 226 F.3d 412 (5th Cir. 2000).

7. AEIC is currently considering whether to seek this Court’s review of the decision of the New York Court of Appeals; AEIC requires additional time to review the practical and legal consequences of that decision. Additionally, counsel for AEIC have several other pressing matters pending in the courts in the period surrounding the current deadline, including commitments: to file a brief in *McCoy v. Louisiana*, No. 16-8255 (U.S.), on January 12, 2018, and to present oral argument in that case on January 17, 2018; to file a brief in opposition to a certiorari

petition in *Ritz-Carlton Development Company v. Narayan*, No. 17-694 (U.S.), on January 10, 2018; to file a brief in *Fulcher v. Secretary of Veterans Affairs*, No. 17-1460 (Fed. Cir.), on December 29, 2017; and to file a brief in *United States v. Scudder*, No. 17-3972 (6th Cir.), on December 27, 2017.

8. This Court would have jurisdiction pursuant to 28 U.S.C. §1257(a).

9. The requested extension would not result in unfair prejudice to the State of New York, especially because the requested extension would not cause oral argument to be delayed to a later Term, should the Court grant the petition.

For the foregoing reasons, AEIC respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended to and including February 21, 2018.

Respectfully submitted.



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